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No. 00-1712

In The

Supreme Court of the United States

CHRISTOPHER VENEKLASE, PAUL B. MEHL, DAROLD LARSON, NANCY EMMEL and JESSICA UCHTMAN,

Petitioners,

v.

CITY OF FARGO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CITY OF FARGO'S BRIEF IN OPPOSITION

Respondent City of Fargo respectfully submits the following Opposition to the Petition for a Writ of Certiorari filed by Christopher Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel and Jessica Uchtman (hereinafter "Petitioners," "demonstrators," or "protestors").

COUNTER-STATEMENT OF THE CASE

On a Thursday night in October 1991, between 10:00 p.m. and 10:30 p.m., a group of ten to fifteen protestors staged a demonstration outside the home of Fargo resident Jane Bovard. The protestors walked continuously back and forth, in single file, on the sidewalk in front of the Bovard home, including in their route the two to three houses on either side of the targeted residence. At least one demonstrator was in front of the Bovard home at all times. When Ms. Bovard returned home that night and observed the picketers, she was scared. She later testified that she called the Fargo police because she was concerned for her own safety as well as that of her neighbors. When the police arrived, they observed the protestors staging a targeted demonstration in front of the Bovard home. The police knew that Ms. Bovard was employed as the administrator of Fargo's sole abortion clinic. After observing the demonstrators for some time, the officers informed them that their actions violated Fargo's residential picketing ordinance. More than once, the officers

asked the protestors to leave. The police finally arrested those persons who refused to leave.[1]

The demonstrators subsequently brought claims against the City of Fargo and the arresting police officers alleging, among other things, violations of 42 U.S.C. § 1983 based on allegations of false arrest and a failure to train. In an interlocutory ruling, the court below held that the individual police officers were each entitled to qualified immunity based on their reasonable actions in light of the clearly established law at the time. *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996) (*Veneklase I*). The district court ultimately ruled that Fargo's residential ordinance was not "content neutral" and, accordingly, that the City of Fargo had violated Plaintiffs' constitutional rights. App. J1-J11. A jury trial was held solely on the issue of damages based on the non-content neutrality of the ordinance, and the jury awarded plaintiffs a total of $2,431 in damages. The judge subsequently awarded attorneys' fees and costs to Plaintiffs' counsel in the amount of approximately $52,000. App. I1-I2. The City of Fargo appealed. An *en banc* court reversed the judgment against the City of Fargo for damages and assessment of attorney fees and costs based largely on an intervening decision by this Court. See *Veneklase v. City of Fargo*, 248 F.3d 738 (8th Cir. 2001) (*Veneklase II*). The plaintiffs filed their Petition for Writ of Certiorari ["the Petition"] on May 14, 2001.

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[1] See *Veneklase v. City of Fargo*, 248 F.3d 738, 743 (8th Cir. 2001), citing *Veneklase v. City of Fargo*, 78 F.3d 1264, 1266 (8th Cir. 1996). Also see police reports. App. P1-P3.

REASONS TO DENY THE WRIT

Prior to the Petition, the primary focus of the parties and the court below was whether Fargo's picketing ordinance was "content neutral". This Court's intervening decision in *Hill v. Colorado*, 530 U.S. 703 (2000), however, clarified that the Fargo ordinance is clearly content neutral and, appropriately, Petitioners have now abandoned that claim. See Petition at 9 n. 2.

That now-abandoned claim was Petitioners' only remaining viable cause of action in this litigation. Petitioners' overbreadth claim is moot. Moreover, even if it were not moot, Petitioners' overbreadth claim is directly and clearly governed by this Court's decision in *Frisby v. Schultz*, 487 U.S. 474 (1988), and, therefore, is also not meritorious. The other claims advanced by Petitioners are similarly not meritorious and were correctly decided by the Eighth Circuit below. Accordingly, Petitioners' writ should be denied.

I. THE PETITION PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT

A. Petitioners' Overbreadth Claim is Moot: the Fargo Ordinance was Repealed in 1998 and Only Prospective Relief is Available on a Claim that an Ordinance is Unconstitutionally Overbroad.

The Fargo residential picketing ordinance at issue in this case was repealed on January 26, 1998. See Fargo Ordinance 2843 (reproduced in the Appendix hereto). The City of Fargo has not reenacted the ordinance and has not

declared or demonstrated any intention of doing so.[2] Accordingly, the primary question presented by the Petition, namely whether the Fargo ordinance is overbroad on its face, is moot.[3]

The First Amendment overbreadth doctrine is limited to claims for prospective relief. See, e.g., *City of Houston v. Hill*, 482 U.S. 451, 459 n. 7 (1987) (stating that a person may have standing to seek prospective relief to challenge ordinance as overbroad even when the ordinance has

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[2] The City of Fargo did not repeal its ordinance in an attempt to defeat jurisdiction. Cf. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982) (holding that city's repeal of ordinance after district court held ordinance unconstitutional did not moot case because city had announced its intention to reenact ordinance if case was dismissed on mootness grounds). To the contrary, the City of Fargo abandoned the ordinance more than four years ago and it has never attempted, or stated that it intends, to reenact the residential picketing ordinance. See, e.g., *Massachusetts v. Oakes*, 491 U.S. 576, 582 (1989) (holding that amendment of law prohibiting pornography of minors mooted overbreadth challenge) ("Because the special concern that animates the overbreadth doctrine is no longer present after the amendment or repeal of the challenged statute we need not extend the benefits of the doctrine to a defendant whose conduct is not protected."); See also *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1223 (10th Cir. 2001) (holding that *Mesquite* applies to prevent case from being moot only where city intends to reenact ordinance); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) (same); *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 645 (6th Cir. 1997) (same); *Barilla v. Ervin*, 886 F.2d 1514, 1521 (9th Cir. 1989) (same).

[3] This Court is obligated, of course, to determine whether a live case or controversy exists before examining the merits of Petitioners' overbreadth claim. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

been repeatedly and constitutionally applied to that person in the past); *Secretary of State of Maryland v. Munson*, 467 U.S. 947, 958 (1984) ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society – to prevent the statute from chilling the First Amendment rights of other parties not before the court. Munson's ability to serve that function has nothing to do with whether or not its own First Amendment rights are at stake."); *New York v. Ferber*, 458 U.S. 747, 772-73 (1982) ("This requirement of substantial overbreadth may justifiably be applied to statutory challenges which arise in defense of a criminal prosecution as well as civil enforcement or actions seeking a declaratory judgment."). It does not give rise to damages because it is a doctrine limited to facial challenges, see, e.g., *City of Morales v. Chicago*, 527 U.S. 41, 52 (1999) ("the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.' ") quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615 (1973); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 619 (1998) ("we have routinely understood the overbreadth doctrine to apply where the plaintiff mounts a facial challenge to a law investing the government with discretion to discriminate on viewpoint when it parcels out benefits in support of speech."); *Alexander v. United States*, 509 U.S. 544, 555 (1993) ("The 'overbreadth' doctrine . . . permits a [criminal] defendant to make a facial challenge to an overly broad statute restricting speech, even if he himself has engaged in speech that could be regulated under a more

narrowly drawn statute."). The doctrine does not permit the award of damages to compensate for injury resulting from application of the challenged ordinance. See, e.g., *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 309 (1986) (emphasizing that damages must always be designed to compensate for personal injury, even when the constitutional right implicated is the First Amendment); *Carey v. Piphus*, 435 U.S. 247, 254-55 (1978) (applying traditional principles of common law torts to Section 1983 claims, stating that damages may only compensate for constitutional injuries personally and actually suffered). Instead, the overbreadth doctrine permits "an individual who's own speech or expressive conduct may validly be prohibited or sanctioned . . . to challenge a statute on its face because it also threatens others not before the court – those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503 (1985). The doctrine was designed as a departure from traditional rules of standing to enable persons who are themselves unharmed by the defect in a statute nevertheless to challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in other situations not before the Court. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

Accordingly, when persons invoke the overbreadth doctrine, as Petitioners' attempt to do in this case, they are not asserting a claim for damages based on the doctrine, since any claim for damages is necessarily a function of how the ordinance has been applied to them. See

Stachura, 477 U.S. at 309; *Carey*, 435 U.S. at 254-55.[4] Petitioners' facial overbreadth challenge to the Fargo ordinance is for prospective relief only. Because the ordinance was repealed in 1998, the facial challenge is now moot.[5] Accordingly, because the Petition does not present this Court with a case or controversy as to the primary question presented, the petition should be denied.

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[4] In his dissent from the *en banc* decision below, Judge Arnold cites two cases for the proposition that "[a] city is liable for damages under Section 1983 if its officers deprive someone of liberty pursuant to a facially unconstitutional municipal ordinance." See *Veneklase*, 248 F.3d at 753 (citing *Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996) and *Gerritsen v. City of Los Angeles*, 994 F.2d 570 (9th Cir. 1993)). Yet neither stands for the principle that a plaintiff asserting a facial overbreadth challenge to an ordinance (in other words, not an as-applied challenge based on personal injury) is entitled to damages. In *Douglas*, the protestors challenged both residential picketing and parade-permit ordinances seeking damages, injunctive, and declaratory relief under Section 1983. *Douglas*, 88 F.3d at 1514. The court in *Douglas* determined that even though the doctor moved from the town, the protestors still had standing because their challenge was not solely based on their desire to picket the doctors' residence. In *Gerritsen*, the Court is clear that the damages awarded were only as to the "as-applied" claims. See, e.g., *Gerritsen*, 944 F.2d at 577. Contrary to the dissent's assertion, overbreadth claims do not give rise to damages.

[5] To the extent that Petitioners attempt to bootstrap their overbreadth challenge into a claim for damages, they are misguided. Petitioners are eligible for damages for their own personal injuries, in other words, for any damages that result from application of the ordinance to them. That claim presents a distinctly as-applied challenge to the ordinance and, for the reasons set forth below, is similarly defective.

B. The Eighth Circuit Correctly held that the Fargo Ordinance is Nearly Identical to the Ordinance Held Facially Constitutional in *Frisby*.

Even if the repealed Fargo ordinance did not present a moot question on its face, Petitioners acknowledge that it was "virtually identical" to the ordinance upheld as constitutional on its face by this Court in *Frisby*. Therefore, the court below correctly determined that the Fargo ordinance, like the *Frisby* ordinance, was constitutional on its face. See *Veneklase v. City of Fargo*, 78 F.3d at 1268 n. 4; 904 F.Supp. at 1053-54. The facial construction of the ordinance does not present an important question of federal law, but a straightforward one correctly resolved by the Eighth Circuit consistent with this Court's relevant decisions.

The prohibitory language of the Fargo ordinance states:

> 10-1202. Picketing of dwellings prohibited. – No person shall engage in picketing the dwelling of any individual in the City of Fargo.

Veneklase II, 248 F.3d at 741. The Fargo ordinance also defined the term "[d]welling" to mean "any structure or building, or dwelling unit within a building, which is used as a place of residence" and the term "[p]icketing" to mean "the practice of standing, marching, or patrolling by one or more persons inside of, in front, or about any premises for the purpose of persuading an occupant of such premises or to protest some action, attitude or belief." *Veneklase II*, 248 F.3d at 741.

Similarly, the ordinance upheld by this Court in *Frisby* provides:

> It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

Frisby v. Schultz, 487 U.S. 474, 477 (1988). The term "picketing" was determined to mean "posting at a particular place." See *Frisby*, 487 U.S. at 482. Fargo's ordinance, like the *Frisby* ordinance is not overly broad on its face.

1. The Fargo Ordinance is Susceptible on its Face to a Narrow Construction that Avoids Constitutional Difficulties.

Like the *Frisby* ordinance, the Fargo ordinance is on its face readily susceptible to a narrow construction that avoids constitutional difficulties. Ordinances should be construed to avoid constitutional difficulties. See, e.g., *Frisby*, 487 U.S. at 483 (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975); *Broadrick*, 413 U.S. at 613; *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988)). In *Frisby*, this Court construed the ordinance before it narrowly in an effort to uphold the ordinance as constitutional. *Frisby*, 487 U.S. at 482. Specifically, this Court recognized that "the use of the singular form of the words 'residence' and 'dwelling' suggests that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence." *Id.* at 482. Moreover, the definition of picketing was "in line with viewing the ordinance as limited to activity focused on a single residence." *Id.* at 483. Accordingly, this Court concluded that the ordinance should be construed narrowly and, so construed, passed constitutional muster. *Id.*

The Eighth Circuit likewise correctly construed the Fargo ordinance by applying the precise analysis this Court applied in *Frisby*. The court held that the Fargo ordinance, like the *Frisby* ordinance, was susceptible to a narrow construction sufficient to uphold the ordinance as constitutional on its face. Like the *Frisby* ordinance, the Fargo ordinance used the singular form of the word "dwelling." See *Veneklase II*, 248 F.3d at 741 (citing Fargo Municipal Code § 10-1201(A), 10-1201(B)). Like the *Frisby* ordinance, the Fargo ordinance clearly defined its terms to apply to a single residence. See *Veneklase II*, 248 F.3d at 741 (citing Fargo Municipal Code § 10-1201(A) (defining dwelling in strictly singular terms, such as "any structure or building")). Finally, like the *Frisby* ordinance, the Fargo ordinance defined picketing to apply to a single home. See *Veneklase II*, 248 F.3d at 741 (citing Fargo Municipal Code § 10-1201(A) (limiting picketing to activities involving "any premises")).

Accordingly, like the ordinance in *Frisby*, the Fargo ordinance is constitutional on its face. This Court has stated that, "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference. . . . In accommodating these competing interests the Court has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts. . . . " See *Erznoznik*, 422 U.S. at 216. Indeed, as this Court has also stated, application of the overbreadth doctrine to invalidate a local ordinance is "strong medicine . . . employed by the Court sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. Thus, the Eighth Circuit correctly followed *Frisby* by

holding that the Fargo ordinance, narrowly construed, was constitutional on its face.

The Fargo ordinance was virtually identical to the ordinance upheld as constitutional on its face in *Frisby*. The Eighth Circuit's decision correctly ruled that the Fargo ordinance was similarly constitutional on its face.

2. Expansive Responses by an Enforcement Officer to Hypothetical Questions Are Not Determinative of How An Ordinance Should Be Construed on its Face.

Petitioners and the dissent in *Veneklase II* attempt to create a question of federal law from the deposition testimony of the former Fargo police chief regarding the scope of the now-repealed ordinance. Indeed, the dissent's conclusion that the Fargo ordinance was overbroad rests almost entirely on that deposition colloquy. See *Veneklase II*, 248 F.3d at 752. The law is clear, however, that when the constitutionality of an ordinance is considered *on its face*, it is inappropriate for a court to consider every hypothetical fact pattern that might possibly invite application of the ordinance. Indeed, in *Frisby*, this Court stated:

> Of course, this case presents only a facial challenge to the ordinance. Particular hypothetical applications of the ordinance . . . may present somewhat different questions. Initially, the ordinance by its own terms may not apply in such circumstances, since the ordinance's goal is the protection of residential privacy, . . . , and since it speaks only of a "residence or dwelling," not a place of business. . . . Moreover, since our First

> Amendment analysis is grounded in protection of the unwilling residential listener, the constitutionality of *applying the ordinance to such hypotheticals remains open to question. These are, however, questions we need not address today in order to dispose of appellees' facial challenge.*

Frisby, 487 U.S. at 488 (internal citations omitted) (emphasis added); see also, *FCC v. Pacifica*, 438 U.S. 726, 743 (1978) ("We will not now pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable, . . . but will deal with those problems if and when they arise.") (internal citations omitted); *Lindsey v. Normet*, 405 U.S. 56, 65 (1972) ("[P]ossible infirmity in other situations does not render [a statute] invalid on its face."); *Allen-Bradley Local No. 1111, United Electrical, Radio and Machine Workers of America v. Wisconsin Employment Relations Board*, 315 U.S. 740, 746 (1942) (court will not "assume in advance that a State will so construe its law as to" make it unenforceable).

Moreover, it is well established that, when presented with expansive interpretations of a local law otherwise capable of construction without such interpretations on its face, this Court has rejected those interpretations:

> The law in question, a criminal statute, is not administered by any agency but *by the courts*. . . . [W]e have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.

Crandon v. United States, 494 U.S. 152, 177-78 (1990) (Scalia, J. concurring) (emphasis added). Thus, in *Crandon*, this Court declined to rely on an expansive

construction of a criminal statute. See generally, *Crandon*, 494 U.S. at 152.

Similarly, the facial construction of the Fargo ordinance is not determined by deposition responses to hypothetical questions about possible future applications of the ordinance. Cf. *Schultz v. Frisby*, 877 F.2d 6, 8 (7th Cir. 1989) ("[t]he Constitution does not require [a city] to answer hypothetical questions before it may enforce the law. Incompleteness is a curse of language, as of human imagination. To say that precision is a precondition to enforcement is to say that no ordinance regulating speech may stand – a proposition the Supreme Court has rejected over and over again."); *Broadrick*, 413 U.S. at 615 ("[T]here comes a point where that effect – at best a prediction – cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.").

Moreover, it is undisputed that the individual police officers in this case were entitled to qualified immunity because their actions were objectively reasonable in light of the constitutional law that was clearly established at the time. *Veneklase I*, at 1269. It is well established that police officers are not expected to be constitutional scholars who anticipate legal developments See, e.g., *Crawford-El v. Britton*, 523 U.S. 574, 590 (1998). The police chief's deposition statements, therefore, regarding the possible applications of the statute, could not be regarded

as controlling as to the issue of whether the statute is facially constitutional – they were not even controlling on the issue of individual liability, since the Eighth Circuit held that the law was not clearly established on the subject.

On its face, the Fargo ordinance was readily susceptible to a narrowing and constitutional construction and the Eighth Circuit properly did not regard the police chief's deposition testimony regarding the possible scope of the ordinance to be determinative of the construction of the ordinance.

3. The City of Fargo Had a Legitimate and Substantial Interest in Prohibiting Targeted Picketing of a Person's Residence and the Ordinance Did Not Ban Prayer on Public Sidewalks.

This Court has consistently recognized that cities have a legitimate and substantial interest in prohibiting the targeted picketing of a resident's home. Indeed this Court has stated that the "well-being, tranquility, and privacy of the home," are local interests "of the highest order in a free and civilized society." *Frisby*, 487 U.S. at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)). This Court has often "remarked on the unique nature of the home, 'the last citadel of the tired, the weary, and the sick,' and . . . recognized that '[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.' " *Frisby*, at 487 U.S. at

484-85 (quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring), and *Carey*, 447 U.S. at 471)).

In *Frisby*, this Court recognized the power of the government to protect the right of individuals in their homes:

> The First Amendment permits the government to prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech. See *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 542 (1980). Cf. *Bolger v. Youngs Drug Products Corp.* supra, at 72. The target of the focused picketing banned by the Brookfield ordinance is just such a 'captive.' The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech. Cf. *Cohen v. California*, 403 U.S., at 21-22 (noting ease of avoiding unwanted speech in other circumstances). Thus, the 'evil' of targeted residential picketing, the very presence of an unwelcome visitor at the home, *Carey*, supra, at 478 (Rehnquist, J., dissenting), is 'created by the medium of expression itself.' See *Taxpayers for Vincent*, supra, at 810. Accordingly, the Brookfield ordinance's complete ban of that particular medium of expression is narrowly tailored.

Id. at 487. Thus, this Court has held that, "even if some such picketers have a broader communicative purpose, their activity nonetheless inherently and offensively intrudes on residential privacy. The devastating effect of targeted picketing on the quiet enjoyment of the home is beyond doubt." *Frisby*, 487 U.S. at 486.

The group of ten to fifteen protestors who walked back and forth in front of Ms. Bovard's home on a late weeknight were not simply a "non-focused silent prayer line passing by five to eight houses," as asserted in Petition at 12.[6] They were engaged in a directed protest of the home of the City's sole abortion clinic administrator. At all times during their late-night demonstration, at least one member of the Petitioners' group was in front of the targeted home, as the group continuously marched back and forth in a route that clearly placed Ms. Bovard's home at its epicenter. The Fargo resident targeted by Petitioners' late-night demonstration was certainly an unwilling listener captive in her home. She called on the Fargo police to protect her, and the City of Fargo clearly had a legitimate and substantial interest in doing so.

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[6] Fargo's ordinance did not ban prayer on public sidewalks but did prohibit focused residential picketing. Assuming the protestors in this case were engaged in prayer, that prayer was part of the overall conduct focused on the targeted residence and properly prohibited. See, *Cox v. New Hampshire*, 312 U.S. 569, 578 (1941) (stating that parade permit ordinance did not interfere "with religious worship or the practice of religion in any proper sense . . . [and] only [constituted] the exercise of local control over the use of streets. . . . "). Moreover, this Court has recognized that "picketing" can include a wide variety of activities, including prayer. See *Frisby*, 487 U.S. at 486 (also defining the conduct falling within the picketing ordinance as conduct not for the purpose of disseminating a message to the general public, but for the purpose of intruding on the targeted resident).

C. Petitioners' As-Applied Claim is Not Properly Before this Court Because Petitioners Did Not Appeal the District Court's Finding That Fargo's Ordinance Was Not a Policy or Failure to Train that Violated the Constitution.

The court below correctly held that there was no viable as-applied challenge to the Fargo ordinance because the district court's rulings had specifically and correctly addressed and rejected Petitioners' claim that the City of Fargo had a policy authorizing illegal arrests or the City had failed to train its police officers. See *Veneklase II*, 248 F.3d at 748. Petitioners, however, did not appeal those findings by the district court to the court of appeals, and they do not argue even to this Court that either of the two lower courts erred. See *Veneklase II*, 248 F.3d at 747-48. Instead, Petitioners argue that their as-applied claim is meritorious on the ground that the City of Fargo did not have a legitimate and substantial interest in prohibiting their actions. As discussed, supra, however, the City of Fargo clearly did have a legitimate and substantial interest in prohibiting the targeted residential demonstrating that gave rise to Petitioners' arrest. Accordingly, Petitioners' as-applied claim is foreclosed and their arguments regarding the as-applied constitutionality of the Fargo ordinance provide no basis to grant their Petition.[7]

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[7] Even Judge Arnold, in his dissent below, does not contend that the protestors in this case have a surviving as-applied challenge. See *Veneklase*, 248 F.3d at 749-753 (dissent).

D. Even If The As-Applied Claim was Not Foreclosed, The City Is Not Liable because the City Did Not Fail to Properly Train Its Police Officers and the City Did Not Have a Policy or Custom Which Authorized the Violation of State or Federal Law.

Even assuming *arguendo* that Petitioners preserved an as-applied challenge, the Eighth Circuit correctly held that, even if Petitioners could prove that the ordinance had been unconstitutionally applied to them, it would be necessary to demonstrate that the City had (a) a policy or custom authorizing conduct contravening federal and state constitutions and law, or (b) deficient police training, and Petitioners failed to show either. See *Veneklase II* at 748.

Petitioners contend that the City should be liable for the arrests for any protesting that occurred beyond Ms. Bovard's single residence. They claim that because they demonstrated in front of the two or three houses on either side of the targeted residence, their actions were outside the scope of the Fargo ordinance. Accordingly, they maintain that they were arrested because the police were not properly trained and unconstitutionally applied the ordinance to them.

A failure to train results in liability, however, only in limited and narrow circumstances, when such failure amounts to deliberate indifference to the constitutional rights of others. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989). Indeed, a failure to train can be the basis for liability only where it "reflects a 'deliberate' or 'conscious' choice by a municipality." *Id.* at 389. The training

deficiency "must be closely related to the ultimate injury." *Id.* at 391.

In *Veneklase I*, the Eighth Circuit held that the law regarding the permissible scope of application of the Fargo ordinance was not clearly established at the time of Petitioners' arrests. *Veneklase I*, 78 F.3d at 1269. In the opinion below, the Eighth Circuit correctly held that, regarding deficient police training, no liability can flow from the alleged failure to train the Fargo police officers:

> In light of the Eighth Circuit's ruling [*Veneklase I*] that the law regarding the parameters of the First Amendment right to protest against abortion in a residential area was not clearly established at the time of plaintiffs' arrest, the City's failure to its train [sic] police officers could not serve as the moving force behind the violation of plaintiffs' First Amendment rights. Since the parameters of plaintiffs' First Amendment rights were still in question, any training of the City's police officers would necessarily leave those parameters in doubt. Consequently, the lack of training by the City cannot be the moving force behind the violation of plaintiffs' constitutional rights.

Veneklase II, 248 F.3d at 748, citing Dist. Ct. Mem. and Order, April 10, 1997.

Petitioners' attempt to manufacture a significant question of law out of the Eighth Circuit's straightforward analysis plainly fails. This Court has held that, in order to constitute deliberate indifference sufficient to sustain a failure to train claim against a municipality, "the need for more or different training" must be "obvious." See *City of Canton*, 489 U.S. at 390. The court of appeals

correctly held that it was not possible for the City of Fargo to have been "deliberately indifferent" to rights that were not clearly established, let alone obvious, at the time of the Petitioners' arrests. See *Veneklase II*, 248 F.3d at 748.

Similarly, the Eighth Circuit correctly held that the Fargo residential picketing ordinance did not constitute a policy or custom authorizing the violation of federal or state law. Fargo's residential picketing ordinance was virtually identical to the ordinance in *Frisby* and, indeed, for the short time the ordinance was in effect prior to being repealed, there were no arrests made or violations prosecuted until Petitioners' arrests in the fall of 1991. This Court's decision in *Frisby* upheld a city's ability to prohibit residential protesting narrowly focused on a single residence. See *Frisby*, 487 U.S. 482-86. Petitioners' actions in this case clearly fall within that category of unprotected conduct and, thus, their as-applied claim fails for this reason as well.

Petitioners argue (albeit in the context of advancing their facial overbreadth claim) that *Frisby* was limited to picketing activities that occurred solely in front of a single targeted residence and that by extending their demonstration to the two or three houses on either side of their target's home, they were beyond the reach of both *Frisby* and the Fargo residential picketing ordinance. Once again, Petitioners are incorrect. See *Veneklase v. City of Fargo*, 200 F.3d 1111, 1118 (8th Cir. 1999) (vacated); see also *Veneklase II*, 248 F.3d at 743 ("[w]e essentially adopt the panel opinion in [the vacated *Veneklase* opinion], 200 F.3d 1111. . . . ").

The emphasis of this Court's ruling in *Frisby* was that focused picketing of an individual's residence was conduct that a city could properly proscribe by a residential picketing ordinance. This Court repeatedly stressed that it was the targeted and focused nature of the picketers' activities towards a single residence that rendered their demonstration able to be proscribed. *Id.* at 483-85. Although the demonstrators in *Frisby* contained their actions to an area in front of one house, the targeting in this case was no less focused upon a single residence, notwithstanding that Petitioners extended their route to the two or three houses on either side of Ms. Bovard's home. At all times, at least one protestor was passing in front of Ms. Bovard's home, as the group marched in front of the targeted home and two or three houses on both sides of the home. See *Veneklase II*, 248 F.3d at 743.

As the United States Court of Appeals for the Seventh Circuit stated:

> Surely [protestors] can't evade the law by standing in front of the [targeted] home and occasionally jumping one house on either side.

Schultz v. Frisby, 877 F.2d 6, 8 (7th Cir. 1989); see also *Douglas*, 88 F.3d at 1520 (upholding residential picketing ordinance that proscribed targeted picketing of residence when protestors extended course to three houses on each side of target as narrowly tailored). Petitioners in this case attempted to do precisely that. The Eighth Circuit correctly denied their attempt to evade the narrow reach of Fargo's former residential picketing ordinance. Accordingly, because the Eighth Circuit correctly held that the Fargo ordinance was appropriately applied in this case, the Petition should be denied.

II. JUDGE BYE PROPERLY REFUSED TO RECUSE HIMSELF

Petitioners argue that Circuit Judge Kermit Bye should have recused himself in this case because his former law firm represented Ms. Bovard and the abortion clinic in litigation not related to this case. As Judge Bye stated, Petitioners' Motion to Disqualify him:

> [I]s premised on the fact that the law firm of which I was a member prior to becoming a judge, Vogel, Weir, Hunke & McCormick, Ltd., of Fargo, North Dakota (the "Vogel law firm"), had represented Fargo Women's Health Organization in two cases at approximately the same time the appellees were arrested. One case was a medical malpractice action, in which both Bovard and the clinic were named defendants. See *Sabot v. Fargo Women's Health Org., Inc.*, 500 N.W.2d 889 (N.D. 1993). The other, with the clinic as the plaintiff, was a civil rights suit against the state seeking declaratory and injunctive relief from the North Dakota Abortion Control Act. See *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526 (8th Cir. 1994).
>
> None of the *Veneklase* plaintiffs were parties to either of those lawsuits. Further, neither Bovard nor the clinic is or has been a party in this litigation, although Bovard was called to testify as a witness as to the plaintiffs' damages. The Vogel law firm has never been involved in any manner in this litigation, nor has it ever represented any of the *Veneklase* plaintiffs or the appellant in any other matter. Neither Bovard nor the clinic were at any time in the past ever personal clients of mine. I was never involved as a lawyer or otherwise in any of the matters in

> which my former law firm several years ago represented them.

Veneklase v. City of Fargo, 236 F.3d 899, 900 (8th Cir. 2000); App. E3.

Judge Bye declined to recuse himself, explaining that his law firm's representation of Bovard and the Fargo Women's Health Organization was "isolated, unrelated litigation going back six and seven years prior to my taking the bench." *Id.* Judge Bye went on to state:

> Jane Bovard is not a party in this case. Nor is she even an interested third party with a stake in the outcome. The ordinance at issue in this case has been amended; if plaintiffs or others picket outside Bovard's home in the future, they may still be arrested, but under a different anti-residential picketing ordinance. The court's decision as to the constitutionality of this ordinance therefore has no practical effect on Bovard.
>
> Even if Bovard had an interest in this matter, my former law firm never represented her in connection with this case. Section 455(b) lists specific situations in which a judge must recuse himself or herself from participation in a case; one of these situations is "[w]here in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter . . . " 28 U.S.C. § 445(b)(2). My situation is several steps removed from that described in § 445(b)(2); it is so far removed from a case in which actual bias may be found as to make even the appearance of bias improbable.

> Canon 3c(1) of the Code of Conduct for United States Judges tracks almost identically the wording contained in 28 U.S.C. § 455. The Canon does not require recusal. It has been in excess of six years since my former law firm represented the clinic in *Schafer* and seven years since the firm defended Bovard and the clinic in *Sabot*. I never had any professional or personal relationship of any kind or nature with either, and most certainly no involvement as a lawyer in any of those cases which took place in the early part of the 1990's.

Id. at 900-901.

Justice Kennedy, in a concurring opinion in *Liteky v. United States*, 510 U.S. 540 (1994), explained the high threshold that must be met before a judge should be recused or disqualified from hearing a case:

> Section 455(a) provides that a judge 'shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.' For present purposes, it should suffice to say that § 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings. I think all would agree that a high threshold is required to satisfy this standard. Thus, under § 455(a), a judge should be disqualified only if it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.

Id. at 557, 558 (Kennedy, J., concurring).

There is no evidence or indication that Judge Bye's attitude or state of mind is so resistant to fair and dispassionate inquiry as to cause a party, the public or a reviewing Court to have reasonable grounds to question his neutral and objective findings.

III. THE PETITION PRESENTS NO CONFLICT OF DECISIONS

Petitioners contend that the Eighth Circuit's decision that the Fargo ordinance was constitutional on its face is in conflict with decisions from other United States courts of appeals and, by implication, that this Court should exercise jurisdiction in order to resolve that conflict. There is no circuit split, however, and accordingly the Petition should be denied.

Petitioners attempt to characterize the Sixth Circuit's decision in *Vittitow v. City of Arlington*, 43 F.3d 1100 (6th Cir. 1995) as presenting a direct conflict with the Eighth Circuit decision below. Petitioners ignore, however, that the court in *Vittitow* did not decide a facial challenge to a city's residential picketing ordinance. *Vittitow* involved an appeal from the terms of a district court's preliminary injunction on an as-applied challenge to a residential picketing ordinance and, therefore, it does not conflict with the *Veneklase II* holding that the Fargo ordinance was constitutional on its face. See *Vittitow*, 43 F.3d at 1100.

Indeed, in *Vittitow*, the Sixth Circuit acknowledged that, if the ordinance had been examined on its face and determined to be "facially valid," the city's enforcement of the ordinance would have to be determined on a case-by-case basis. See *Vittitow*, 43 F.3d at 1106. In *Vittitow*,

however, the court regarded the challenge to be an as-applied one, stating that a different course was required because the challenge was as-applied by virtue of the actual enforcement of the ordinance. *Id.* The Sixth Circuit did not regard the district court's preliminary injunction either to be sufficiently clear, see 43 F.3d at 1105 n. 6, or sufficiently tailored under this Court's decision in *Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994), for the injunction to stand. See *Vittitow*, 43 F.3d at 1105-06.

Indeed, a significant difference between *Vittitow* and this case is that in this case the Eighth Circuit addressed the constitutionality of an ordinance while *Vittitow* involved the scope of an injunction, a distinction this Court has recognized in requiring that an injunction must be more precise than an ordinance. See *Madsen*, 512 U.S. at 764-65. An injunction must "burden no more speech than necessary," *id.*, while an ordinance – drafted through legislative compromise – must only be "narrowly tailored." *Frisby*, 487 U.S. at 482.

In short, *Vittitow* is not in direct conflict with the decision below because the Eighth Circuit clearly construed an ordinance on its face – not an injunction as applied. See *Vittitow*, 43 F.3d at 1105.[8] Similarly, the two

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[8] In *Douglas v. Brownell*, the Eighth Circuit had held that an ordinance that prohibited picketing the area immediately in front of a doctor's home and one house on each side of his home was constitutional. 88 F.3d 1511, 1520 (8th Cir. 1996). Unlike the injunction in *Vittitow*, which was a complete ban on residential picketing, the *Douglas* ordinance (and similarly the Fargo ordinance), allowed picketing through the neighborhood. *Douglas*, 88 F.3d at 1520. Protestors were not prohibited from "passing by" the targeted residence (as they would have been

other cases cited by Petitioners as creating "conflicts in principle" are red herrings not in conflict with the Eighth Circuit's decision – either in principle or in reality. The Eleventh Circuit's decision in *Lucero v. Trosch*, 121 F.3d 591 (11th Cir. 1997), was an appeal of a Freedom of Access to Clinic Entrance injunction; it did not involve the construction of an ordinance. In *Lucero*, the court invalidated an injunction that provided a 200-foot buffer zone around all clinic employees' residences because the injunction was not sufficiently tailored. *Id.* at 606. Nevertheless, the court recognized that this Court's decision in *Madsen* "makes clear that its precedents support restriction of targeted picketing rather than a generalized restriction." *Lucero*, 121 F.3d at 606. Thus, *Lucero* in no way conflicts – and in fact it is consistent with – the decision below.

Similarly, the Seventh Circuit's opinion on remand in *Schultz v. Frisby*, 877 F.2d 6 (7th Cir. 1989), does not conflict with the *Veneklase* decision, as the holding was limited to declining a request to certify a question to the Wisconsin Supreme Court regarding construction of the ordinance. See *Schultz*, 877 F.2d at 7 ("So far as *this* case is concerned the meaning of the ordinance is what the Supreme Court said it means, and having this meaning is constitutional.") (emphasis in original). Thus, the issue of construing the ordinance was not before the Seventh Circuit because precisely that issue had already been decided by this Court in *Frisby*. Nevertheless, in *dicta* the Seventh Circuit remarked that, "The Constitution does

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under the *Vittitow* injunction) unless they were engaged in "focused" picketing.

not require [the city] to answer [all questions regarding the scope of the ordinance as applied] before it may enforce the law. . . . To say that precision is a precondition to enforcement is to say that no ordinance regulating speech may stand – a proposition the Supreme Court has rejected over and again." See *Schultz*, 877 F.2d at 8. Moreover, the court acknowledged that this Court's decision in *Frisby* allowed for application of a residential picketing ordinance beyond a single home. *Id.* at 8 ("The trial scheduled for August 1989, and subsequent appellate proceedings in the Wisconsin courts, may elucidate the meaning of the ordinance as applied to picketing that takes in several houses but might still be thought to dwell on one."). The *Schultz* decision not only does not conflict with the *Veneklase* decision below, like *Lucero*, it supports it.

Thus, a careful examination of the cases cited by Petitioners belies their efforts to manufacture a split in the circuits. Accordingly, because there is no split in authority between the Eighth Circuit's decision below in *Veneklase II* and the decisions in *Vittitow*, *Lucero*, or *Schultz*, this Court should deny the Petition.

CONCLUSION

WHEREFORE, the City of Fargo respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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July 18, 2001

APPENDIX

Fargo Municipal Code Ordinance No. 2843.....A1

OFFICE OF THE CITY ATTORNEY
FARGO, NORTH DAKOTA

ORDINANCE NO. 2843

AN ORDINANCE REPEALING ARTICLE 10-08 OF CHAPTER 10 OF THE FARGO MUNICIPAL CODE RELATING TO PICKETING

Be It Ordained by the Board of City Commissioners of the City of Fargo:

Section 1. Repeal.

Article 10-08 of the Fargo Municipal Code is hereby repealed in its entirety.

Section 2. Effective Date.

This ordinance shall be full force and effect from and after its passage and approval.

/s/ Bruce W. Furness
Bruce W. Furness, Mayor

(SEAL)

Attest:

/s/ Carol J. Kraft
Carol J. Kraft, City Auditor

First Reading: 01/12/98
Second Reading: 01/26/98
Final Passage: 01/26/98